

CYNTHIA J. SERRAULT, DECEASED

Claimant

V.

HOOSIER FOOD SERVICE, INC.

Uninsured Respondent

AND

THE KANSAS WORKERS COMPENSATION FUND

Docket No. 1,065,799

ORDER

The Kansas Workers Compensation Fund (Fund) requested review of the November 21, 2014, Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on April 24, 2015, in Topeka, Kansas.

APPEARANCES

Jan L. Fisher, of Topeka, Kansas, appeared for the deceased claimant. Christopher J. Shepard, of Great Bend, Kansas, appeared for respondent. Norman R. Kelly, of Salina, Kansas, appeared for the Fund.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant met with personal injury, by accident, arising out of and in the course of her employment with respondent, and that the accident was the prevailing factor in causing her injuries, need for medical treatment and eventual death. Respondent and the Fund were found responsible for the medical bills incurred in treating claimant's injuries, subject to the Kansas Medical Fee Schedule. It was further found claimant's grandson, Alexavier Saucedo, (hereinafter Alexavier) was a wholly dependent child within the meaning of the Kansas Workers Compensation Act, and entitled to benefits in accordance with that status. It was conceded that respondent did not have a valid policy of workers compensation insurance in effect for its Kansas operations, and the evidence

establishes respondent is financially unable to pay the outstanding medical expenses or the benefits due Alexavier. Therefore, the Fund is responsible for those expenses and benefits found to be due and owing.

The Fund appeals, arguing Alexavier is not entitled to survivor's benefits because his mother, Hollie Goben, was dishonest in reporting the amount of monetary support she received from claimant per month and failed to prove her son was actually dependent in whole or in part on claimant. The Fund also argues that even if claimant provided some level of support, it was significantly less than the alleged amount. The Application for Review of the Fund, filed with the Board, includes issues addressing whether claimant met with personal injury or by accident, which arose out of and in the course of her employment with respondent and whether the work accident was the prevailing factor in causing claimant's injuries, her need for medical treatment and eventual death. At oral argument to the Board, the Fund advised those issues were no longer contested.

Claimant argues the Award should be affirmed.

The only issue on appeal is: was claimant's grandson, Alexavier, a wholly dependent child to her pursuant to K.S.A. 2012 Supp. 44-510b?

FINDINGS OF FACT

Barbara Serrault, the deceased claimant's mother, testified claimant, claimant's daughter, Hollie, and claimant's grandson, Alexavier, lived together in the house Barbara owned. She testified claimant lived with her for 10 years or more and paid rent. Claimant paid \$300 to \$400 a month for rent and, when Hollie and Alexavier moved in, additional arrangements were discussed. Barbara testified claimant paid Hollie and Alexavier's contribution to the household finances and gave Hollie money when needed. Barbara testified she pays all of the bills, including the gas and electric. Hollie paid what she could because she didn't make much money. Since claimant's death, Hollie gives Barbara \$20 dollars, and more when she can. Barbara indicated she has \$700 -\$800 in income. She estimated her monthly bills are around \$400.

Claimant's daughter, Hollie Goben, testified she and her son moved in with her grandmother, Barbara, in 2012, and that her mother (claimant) was already living in the house. Hollie moved in because she had no other place to go after her divorce and she was not financially able to support herself and her son.

Hollie currently works for Dillon's as a cashier and was working there at the time of claimant's accident. She works 20 to 25 hours a week, except in the summer when hours are cut and she only works 12 to 20 hours a week. Her hourly wage is \$7.45 an hour. She nets \$100 to \$130 per week. She also collects \$100 to \$125 a month in court-ordered child support and receives \$160 in food stamps. Hollie pays \$100 a week in child care and helps her grandmother with the bills and rent by contributing what she can.

Hollie testified that prior to the accident, claimant contributed to her income on a regular basis. Hollie testified claimant helped her by purchasing clothing for her son. She estimated claimant contributed \$400 a month for her and her son's expenses. This money was received in cash. The arrangement was whatever Hollie couldn't pay on daycare claimant would provide. Claimant would also pay Barbara for her and Hollie's share of the bills for the house. This agreement was to remain until Hollie found a job, but she needed more help than she figured because daycare costs were more than expected. Hollie testified she has to pay for daycare because she doesn't get enough work hours at Dillon's to qualify for daycare assistance. She testified she needs to average 28 hours a week to get help with daycare.

Hollie testified that since the accident, she has fallen \$1,500 behind on daycare and had to use her tax money to pay it. Because she makes so little, Hollie is not able to pay all of her bills on a regular basis. She regularly runs short on paying daycare because she needs the money for other expenses. Hollie runs about \$100 short every month. Also, because Hollie is so short on money, she is not able to pay her grandmother any more than \$40 to \$60 a month, and she is not able to buy things that her son needs for his personal care.

Hollie has had to borrow money from family to buy her son what he needs, but she has to pay them back. When Hollie borrows money she usually borrows from her aunt, Julie Tinkler. She was not expected to pay claimant back for the monetary support she received.

Q. Okay. When your mom contributed money -- when Cindy contributed money to you -- you've said before that family members will give you money but it's a loan.

A. Yes.

Q. Was it a loan from Cindy or was it --

A. No.

Q. -- just support?

A. No, she loved my son and, you know, that was like her everything, so she didn't really care.

Q. There was never any discussion that you would pay her back?

A. No.

Q. Okay. Was there any accounting done to see how much she'd pay each time or was it just whatever you needed?

A. Yeah, just whatever I needed but -- yeah.¹

...

Q. Okay. What was the arrangement as to your understanding when you first moved back from Wichita as to any rent, expenses, anything that you were responsible for financially, what did you understand that to be?

A. My mom just said she would help me out with whatever I needed help with and she would help my grandma on my part.

Q. Okay. I appreciate that, but what did you have to contribute yourself? Was there any agreement?

A. Whatever I could, just. . .

Q. So at some point I assume you found the job with Dillon's?

A. Yes.

Q. Okay. And before your mother had the work accident when you were living there with her and your grandmother, how much on average were you contributing toward rent, food, utilities, those necessary monthly expenses?

A. Before the accident?

Q. Yes, ma'am.

A. Twenty every week or every other week. It just varied on what my paychecks were. Just whatever.

Q. So --

A. And since we were family it was just kind of a helping each other thing.

Q. Okay. So in a four-week month it would have been at least eighty a month, and if there was only three weeks --

A. Yeah, it would be eighty or less.

Q. Okay.

A. I mean, some weeks if I had to pay other things for Alex or my mom couldn't help that week or something, then I would have to pay for it and then I couldn't pay

¹ Goben Depo. at 18-19.

either my grandma or all my day care also, and then my mom would help pick up the rest of the balance when she could.

Q. On day care?

A. Yeah, on day care and -- I mean, it was just a lump sum of all -- of everything, of day care and utilities and rent, whatever, and necessities.²

Julia Tinkler, claimant's sister, testified that over the last five years, she saw claimant twice a week and they were close. Ms. Tinkler indicated her sister knew there was a possibility she could die from surgery, so claimant wanted to have a written statement that expressed her desire to continue providing support for her daughter and grandson should anything happen to her. This statement was put together while claimant was in a nursing home.

Ms. Tinkler indicated she had direct knowledge of her sister providing cash support to Hollie and Alexavier through conversations at their mother's house.³ Ms. Tinkler witnessed claimant giving money to their mother at least three or four times. Ms. Tinkler testified her understanding of the arrangement was that claimant would provide Hollie and Alexavier financial help while they lived in the home.

When asked how the \$400 a month came about, Ms. Tinkler testified it was what her mother and claimant agreed upon. This money was for Alexavier, Hollie and claimant for living with Barbara. How the \$400 was split for the three is unknown. Ms. Tinkler understood her mother was going to use the money she received for food or anything needed to take care of Alexavier and Hollie. She also knew claimant was paying their mother rent and money for other expenses while she lived there before Hollie and Alexavier moved in, but the amount is not known. The exchange was always in cash.

Q. Is Hollie, to your knowledge, providing any support or rent payment or any type of payment to your mother on a monthly basis?

A. She gives my mother money, what she can afford at this time, and she --

Q. Did she -- I'm sorry, I interrupted.

A. No, that's okay. It could be twenty-five to fifty. It just depends on what her hours are at work, and she does -- she does also get food stamps that help provide, so that's . . .⁴

² *Id.* at 35-36.

³ Tinkler Depo. at 15.

⁴ *Id.* at 47.

Hollie, on her February 2010 application for food assistance, listed her household monthly income as less than \$150, with less than \$100 in cash, checking and savings. She wrote her expected monthly expenses were \$515. She indicated her income was \$8.25 an hour for 27.5 hours a week, expecting to make \$740 a month. She paid \$375 in rent to Raymaldo Lopez and was responsible for paying the electric and gas bills.

On her December 2010 application for food assistance, Hollie listed her household monthly income as less than \$150 with less than \$100 in cash, checking and savings. Her expected monthly expenses were \$515, and she expected to make \$1,320 a month. Since her last application, claimant gave birth to a son and began receiving food assistance in February of 2010. Claimant was making \$8.00 an hour and working 40 hours a week. She began this job on November 22, 2010. She paid \$375 in rent to Raymaldo Lopez and was responsible for paying the electric, gas and telephone bills.

Hollie applied for cash assistance in June 2011. She reported getting \$150 every two weeks from her son's father. Her expenses remained the same. It was also indicated she was getting help from her mother with rent and bills, but no amount was specified.

In March 2013, Hollie applied for food, child care, cash and medical assistance. She indicated her rent was \$100. She expected to earn \$200 and had less than \$100 in the bank. She indicated she received \$97 every two weeks in child support for her son. She had no household expenses at the time and indicated her mother and grandmother provided her transportation.

On July 29, 2013, Hollie reported her rent was \$150 a month. In January or February 2014, claimant's rent was \$200 a month and her child care was \$400 a month. She had no utility payments.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(c)(1)(3) states:

(c)(1) "Dependents" means such members of the employee's family as were wholly or in part dependent upon the employee at the time of the accident or injury.

...
(3) "Wholly dependent child or children" means:

(A) A birth child or adopted child of the employee except such a child whose relationship to the employee has been severed by adoption;

(B) a stepchild of the employee who lives in the employee's household;

(C) any other child who is actually dependent in whole or in part on the employee and who is related to the employee by marriage or consanguinity; or

(D) any child as defined in subsection (c)(3)(A), (3)

(B) or (3)(C) who is less than 23 years of age and who is not physically or mentally capable of earning wages in any type of substantial and gainful employment or who is a full-time student attending an accredited institution of higher education or vocational education.

Alexavier was related to claimant by consanguinity (the natural child of claimant's natural child) and was living with and being supported, in part, by claimant. It is apparent Alexavier's mother, Hollie Goben, was financially incapable of supporting herself and her child on her income. That appears to be the primary reason she and her son moved in with her mother and grandmother after her divorce.

The Board acknowledges Hollie's reported income when applying for food assistance was less than accurate, which impacts her credibility. But, as noted in this record, Hollie was not the only person who testified regarding claimant's ongoing support for Alexavier. Barbara Serrault and Julia Tinkler also identified the support provided by claimant for her grandson.

The Board finds the ruling by the ALJ that Alexavier was a surviving wholly dependent child of claimant is supported by this record and is affirmed. The remaining rulings of the ALJ dealing with the liability of the Fund, as well as the amounts of payments due the surviving child along with the responsibility of respondent (the Fund) to establish a conservatorship for Alexavier, are also affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. This record supports a finding that at the time of claimant's accident, Alexavier Saucedo was a "wholly dependent child" of claimant and is entitled to survivor's benefits.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated November 21, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge